IN THE

Supreme Court of the United States

October Term, 1978

No. 77-6540

HAROLD RAMSEY,

Petitioner,

against

NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

BRIEF FOR RESPONDENT

EUGENE GOLD
District Attorney, Kings County
400 Municipal Building
Brooklyn, New York 11201
(212) 834-5000

RICHARD ELLIOT MISCHEL
Assistant District Attorney
of Counsel

TABLE OF CONTENTS

Table of Authorities

CASES:

CASES (Continued): PAGE

CASES (Continued): PAGE

CASES (Continued): PAGE

CASES (Continued): PAGE

CONSTITUTIONAL PROVISIONS:

STATUTES:

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-6540

—o—

HAROLD RAMSEY,

Petitioner,

against

NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

—o—

BRIEF FOR RESPONDENT

Question Presented

Whether petitioner's counseled plea of guilty was obtained in violation of due process because the trial judge, after one disposition had been rejected and testimony at the *Wade* hearing had been completed, advised petitioner, through his counsel, of the range of sentencing alternatives if he proceeded to trial or pleaded guilty.

Statement of the Case

Harold Ramsey, the petitioner, was convicted of the crime of robbery in the first degree and sentenced to a term of imprisonment of six to twelve years. He now seeks to have his counseled plea of guilty, upon which the conviction rests, vacated on the ground that it was coerced.

Petitioner's present involvement with the law began on January 20, 1975, with his arrest in Kings County for two robberies (App. 14). He was subsequently accused by Kings County Indictment Numbers 431/75 (App. 38-40) and 2588/75 (App. 2-4), of the crime of robbery in the first degree (six counts) and several lesser included offenses.[1] A co-defendant was named in the first indictment (App. 38-40); it was alleged in the second indictment that petitioner acted alone (App. 2-4).

A year and nine months elapsed between petitioner's arrest and sentencing. During that time, he underwent several psychiatric examinations and was found fit to proceed.[2] Petitioner also pleaded guilty twice after the indictments were consolidated for disposition and was permitted by the court to withdraw his plea once. Petitioner was represented by counsel throughout the proceedings. In fact, he had four different attorneys, all of whom were appointed by the court.

[1] N.Y. Penal Law § 160.15 (McKinney 1975) provides in relevant part that:

> A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:
>
> * * *
>
> 3. Uses or threatens the immediate use of a dangerous instrument; or
>
> 4. Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm;
>
> * * *
>
> Robbery in the first degree is a class B felony.

If convicted, as a second felony offender, petitioner faced a more substantial penalty than a first offender. Pursuant to N.Y. Penal Law § 70.06(3)(a), (4) (McKinney 1975), if convicted of robbery in the first degree, petitioner faced sentences ranging from four and one-half years to nine years up to twelve and one half years to twenty-five years.

In 1975, petitioner was examined by psychiatrists four times pursuant to court order: three times to determine his fitness to proceed (App. 76-81; 82-87; 88-95) and once in aid of sentence (App. 98-104). A report by the Probation Department, based upon its interviews with petitioner, was submitted to the court after the first plea of guilty (App. 96-97). In April, 1975, petitioner was found "unfit to proceed" because of his ". . . failure to participate in the psychiatric evaluation . . ." (App. 85), and because he " . . . verbalized suicidal ideas . . ." (App. 92). However, he was found "fit to proceed" in June, 1975 (App. 84-87).

In general, the several reports outlined petitioner's criminal past (App. 80, 86, 95, 102) and revealed a persistent pattern of anti-social behavior manifesting a contempt for authority and law (App. 80-81, 86 and 87, 102 and 104). His difficulties were premised on a tragic childhood and adolescence which included a violent family life, drug abuse, and placement at the Willowbrook State School following a mistaken diagnosis of retardation (App. 80-81, 94, 96-97, 103). One report concluded that petitioner suffered from an unspecified psychosis (App. 81).

[2] N. Y. Crim. Pro. Law Article 730 (McKinney 1971) prescribes the procedure to be followed in evaluating an accused's fitness to proceed.

In the reports, petitioner was described as a manipulator (App. 80) and a malingerer (App. 92). For example, the examining psychiatrists noted that petitioner "... appears to be a rather 'street wise' individual ..." (App. 80), and that his "... present behavior is associated with his dislike of incarceration and the likelihood that with all his years in prison he has acquired the correct answers to give psychiatrists." (App. 81). In another report, after concluding that he was fit to proceed, the doctors stated "[a]t the present time (petitioner) seems to be malingering a psychiatric condition." (App. 92). And in a third report, the examining psychiatrist observed that petitioner "... spoke spontaneously, there is [sic] no unstable symptoms of emotional or mental disturbance on his part; the manner in which he spoke, as well as words, suggest artifice or affection of illness." (App. 94). Petitioner's intelligence was described as "about average or dull-normal." (App. 104).

On September 8, 1975, Kings County Indictment Numbers 431/75 and 2588/75 were consolidated for disposition and petitioner "confirmed" the finding in the latest psychiatric evaluation (July, 1975) that he was fit to proceed (App. 42). Petitioner then offered to plead guilty to the third count of Kings County Indictment Number 431/75, charging robbery in the second degree, a class "C" felony (N.Y. Penal Law § 160.10 (McKinney 1975) (App. 39). The plea was accepted by Honorable Larry M. Vetrano, (App. 44), after petitioner acknowledged that he understood the legal consequences of his plea and that it was voluntarily offered (App. 43), and after he admitted his commission of the crime charged (App. 43). The court conditionally promised to sentence petitioner to a term of

imprisonment of three and one-half years to seven years (App. 43).[3]

On the 19th of December, 1975, petitioner's application to withdraw his plea of guilty was granted by Mr. Justice Vetrano (App. 1). Prior to making the application, petitioner told a medical examiner that " 'I'm taking my plea back', he complained that he had been 'railroaded'. He gave the examiner to believe that he had committed no crime." (App. 43).

Both cases were transferred to Criminal Term, Part 52, where, on August 3, 1976, Honorable Gerald S. Held, J.S.C., conducted a *Wade* hearing[4] on Indictment Number 2588/75 (App. 1, 49-75). The District Attorney called one witness, Mrs. Rebecca Walker, who testified that on the 30th of December, 1974, at approximately 8:30 P.M., petitioner robbed her and other persons, who were in a beauty parlor, at gunpoint (App. 50-51). The lighting conditions in the store were good ("much brighter than ... in the courtroom ...") (App. 52), and petitioner's "... face was towards (Mrs. Walker) all along ..." during the incident, which lasted five to ten minutes (App. 53, 67). At one point, petitioner "... came ... right up to (her)" for two or three seconds (App. 53).

---

[3] As a second felony offender, the minimum sentence available to petitioner was three years to six years (*see*, N.Y. Penal Law § 70.06 (3) (b), (4) [McKinney 1975]).

The conditional promise resulted from a bench conference between the court and defense counsel concerning a disposition of petitioner's cases (App. 43). Petitioner was advised that if the court could not keep its promise because of an unfavorable probation report, he would be permitted to withdraw his plea and proceed to trial. (App. 43).

[4] *See, United States* v. *Wade*, 388 U.S. 218 (1976); and, N.Y. Crim. Pro. Law Section 710.20 (5) (McKinney's Supp. 1977).

Mrs. Walker also testified that she had seen petitioner in the neighborhood on two occasions a few weeks before the robbery (App. 51, 53-54, 55, 56, 60, 61, 62).[5] On each occasion she saw his face and insisted that "(t)wenty years from now I will still remember his face." (App. 64.)[6]

The next day, Indictment Number 431/75 was consolidated into Indictment 2588/75, and petitioner offered to plead guilty to the charge of robbery in the first degree. Mr. Justice Held promised to sentence petitioner to a term of imprisonment of six years to twelve years.

In response to Mr. Justice Held's inquiry, petitioner unhesitatingly acknowledged that he understood the legal consequences of his plea (App. 6-7), including the waiver of ". . . the identification hearing which we have completed but which I (the court) have not ruled upon . . ." (App.7); that he was not "forced", "threatened", or "convinced" to plead guilty; and, that he "(is) pleading guilty because (he is) guilty and because (he is) voluntarily doing it . . ." (App. 7). Petitioner also acknowledged that his counsel (John Avanzino, Esq.) had explained his rights to him and that he was "satisfied with (counsel's) legal services . . ." (App. 7).

The terms of Mr. Justice Held's sentence promise were explained to petitioner and he indicated his understanding of them (App. 7-8). He also indicated that he was " . . . totally reliant on (the court's) promise and (the court's) promise only . . ." (App. 8).

---

[5] Mrs. Walker saw petitioner for the first time six weeks before the robbery.

[6] At the close of Mrs. Walker's testimony, the prosecution rested. The court adjourned the hearing for one day to enable defense counsel to produce a witness (an investigator) to "contradict" Mrs. Walker's testimony concerning a photographic identification of petitioner (App. 73-74, 75). However, no testimony was taken on the return date and, indeed, there is no evidence in the record that the witness was even present in court.

A factual basis for the plea was developed in the record. Petitioner admitted that on December 30, 1974, he stole at gunpoint approximately $150 from patrons and employees of a beauty parlor (App. 8-9). He also admitted that on the 20th of January, 1975, he and another person, who he knew had a weapon, went to a store intending to commit a robbery. There, they forcibly took money from a "(p)erson and drawer." (App. 9).

Petitioner's statement concerning his complicity was ". . . truthful . . . made of (his) free will and accord and (was) . . . complete and full . . ." (App. 8). At no time during the plea proceeding did petitioner assert his innocence or claim that his plea was induced by the court's alleged threat to impose the maximum sentence if found guilty by a jury. The plea was accepted, and petitioner was remanded (App. 10).

On September 17, 1976, petitioner was produced in court for sentencing (App. 18). At the outset, counsel reminded Mr. Justice Held about petitioner's application to withdraw his plea of guilty, which the court noted was being "advanced" (App. 18-19). Petitioner was first adjudicated a "prior predicate felon" (App. 19-21).

The application to withdraw the plea of guilty, dated September 10, 1976, was supported by petitioner's and defense counsel's affidavits (App. 12-17). Petitioner claimed for the first time that he pleaded guilty to crimes he did not commit because of the information he received after the *Wade* hearing from his attorney that the court would sentence him to a term of imprisonment of twelve and one-half years to twenty-five years if convicted after a trial, and because he was "wearied" by his pretrial incarceration (App. 14-15). Petitioner also noted that the day preceding the *Wade* hearing, he was offered a sentence of three and one-half years to seven years, which he rejected because he

was innocent (App. 14). Defense counsel corroborated petitioner's allegations concerning the terms of the plea offers (App. 16) and added that ". . . since the inception of my assignment to defend him (July 23, 1976—twelve days before the plea) the (petitioner) has maintained his innocence. . ." (App. 16).

As part of his response to the application, Mr. Justice Held read portions of the plea proceeding into the record which evidenced petitioner's understanding of, and satisfaction with, the proceeding and the disposition of the two indictments. The portions read also evidenced the voluntary nature of the plea (App. 22). In addition, the court read into the record petitioner's admissions that he committed the robberies charged in the indictments (App. 23-24). At the conclusion of this review, the court asked petitioner if he had lied at the taking of the plea. He responded, "Yes, I am telling you this. You want to let me talk now?" (App.. 24).

At this point, the court's efforts to elicit responses from petitioner became fruitless. He became abusive, often resorting to profanity (App. 24-25), and accused the court of intimidating his lawyer ". . . in front of . . . the jury. . ." (App. 24). Petitioner vehemently protested his innocence and insisted that,

> [t]he only reason I took my plea is because I was coerced.
>
> You also told my attorney if I have a trial, you will give me twelve to twenty-five years, and he told me that.
>
> • • •
>
> You also started making remarks about a mess of people in the beauty parlor and you already had me tried and convicted.

> You said that is my line of work.
>
> When my lawyer said to you that he was ready, we came to the courtroom and you asked my attorney, and he said yes, and you said you are going to trial, and my attorney said yes, and you said I guess your client is innocent.
>
> You are motherfucking right I am innocent. (App. 25) [7]

The repeated admonition to petitioner concerning the use of profanity after this last outburst only encouraged him to further bait Mr. Justice Held. He said: "Then take the handcuffs off. . . .If you are a man, take them off." (App. 25). Petitioner was summarily adjudged in criminal contempt and sentenced to thirty days in jail (App. 25, 26).[8]

In response to further questioning, petitioner stated that, though he lied to the court at the taking of the plea (App. 25), ". . . now . . . I am telling the truth." (App. 25-26). Mr. Justice Held then asked petitioner "(h)ow am I to tell the difference since you are admittedly a liar? (App. 26). Petitioner responded:

> I am innocent and the only reason took the plea is because you are prejudice (sic). . . . I know I cannot get a fair trial from you, and I definitely don't trust you. It is impossible to get a fair trial in front of you. (App. 26).

---

[7] Respondent disagrees with petitioner's observation that he resorted to profanity and invective when "it became clear" that his application to withdraw his plea of guilty would not be "seriously" considered by Mr. Justice Held (*Petitioner's Brief* at p. 9, n.6), To the contrary, we think the record supports the conclusion that the court made every reasonable effort to test the veracity of petitioner's allegations. In any event, petitioner's explanation is no justification for his behavior.

[8] The court ordered petitioner to first serve the thirty day sentence (App. 33, 105-106).

The court denied the application and petitioner continued to antagonize Mr. Justice Held by the use of profanity and invective (App. 26). Petitioner was gagged [9] and the circumstances surrounding the plea were reconstructed by the court and defense counsel.

Mr. Avanzino recalled that, prior to the *Wade* hearing and the selection of the jury, he had a conversation with the court and the prosecutor concerning a disposition. Specifically, the original agreement which petitioner accepted a year earlier, *viz:* a plea to robbery in the second degree in return for a sentence of three and one-half years to seven years, was resurrected. Mr. Justice Held added the proviso that the sentence promise was "... subject, of course, of me (sic) looking at the probation report." (App. 27). Petitioner rejected the offer conveyed to him by counsel and "... indicated ... that he was innocent ..." (App. 27).

After the People rested at the *Wade* hearing, the court offered a plea to defense counsel to robbery in the first degree in return for a sentence promise of "... six to twelve years with the District Attorney's approval." The following reconstruction of events appears in the record:

> Mr. Bavanzino (sic): It was a Miss Walker ... and it was the only one that took the stand, and after that witness, there was some talk about a plea of guilty, and at that time ... the plea of guilty was talked about as I came up to the bench, and we discussed it, and your Honor said that you would give six to twelve with the District Attorney's approval.
>
> I came back and said to my client six to twelve, and he said no, and it went back and forth, and finally we arrived at a decision.

[9] The restraint was obviously not excessive since petitioner was able to remove the gag and speak moments later (App. 27, 29).

* * *

We arrived at a six to twelve year sentence, prior to that time the admonition or the statement was made to me that if this guy goes to trial and he is convicted, he is going to get twelve and a half to twenty-five.

Your Honor told me to take that back to my client which at that time I did, Judge. *I gave him that warning.*

The Court: *Subject of course of me (sic)* reading *the probation report. It is a practice in my court when there is an armed robbery, to give ... a maximum sentence, unless there are mitigating circumstances.*

Mr. Bavanzino (sic): Well, I think your Honor in light of everything, that was the basis of why the (petitioner) took the plea. (App. 28) (Emphasis added).

Counsel conceded that "(w)hen (petitioner) pleaded guilty ... (he) assumed as your Honor did that (petitioner) was guilty." (App.28). However, he also noted that before the entry of the plea, the defense was ready for trial, and a jury had been selected (App. 28).

Mr. Justice Held again denied the application and proceeded with the sentencing.[10] He read into the record petitioner's probation report, which the court had previously reviewed. (App.30). The report indicated that petitioner, who was then twenty-four years old, had a juvenile delinquency record dating back to 1965 (App. 30). Seven months after his release, petitioner was adjudicated a

[10] Petitioner was gagged again and handcuffed to his chair because of his disruptive behavior (App. 29-30).

Youthful Offender[11] for an attempted grand larceny and related offenses. In 1971, he was convicted of robbery in the third degree (App. 31). As a parolee and a predicate felon, petitioner committed the crimes which were the subject matter of his plea (App. 31).

The probation report included the reasons given by petitioner for pleading guilty. First, he claimed that he was "beat up" by the arresting officer (App. 31).[12] Second, petitioner ". . . accepted the plea for the purposes of his own convenience as well as he feared conviction if he were found . . . guilty at trial." (App. 31). Third, petitioner ". . . only pleaded guilty on the advise [sic] of his lawyer, and was tired of being in jail." (App. 32). Fourth, petitioner pleaded guilty because the court's ". . . decision at a *Wade* hearing was prejudicial . . ." and because the court ". . . was prejudicing the jury during the time of selection." (App. 32).[13] Fifth, petitioner complained that he was unable to change judges and feared the imposition of the maximum sentence if convicted after a trial (App. 32).

Petitioner's reasons for wanting to withdraw his plea of guilty were also discussed in the probation report. First, petitioner stated that he did not commit the crimes charged in the two indictments (App. 31, 32). Second, petitioner

[11] *See,* N.Y. Crim. Pro. Law Article 720 (McKinney's Supp. 1977) and N.Y. Penal Law Section 60.02 (McKinney 1975).

[12] The District Attorney is in possession of no evidence to support this allegation, nor has any been proffered by petitioner.

[13] The court in fact never ruled on the motion. This was acknowledged by petitioner at the taking of the plea (App. 7) and by defense counsel at the sentencing (App. 32). With regard to the court's "prejudicing the Jury", Mr. Justice Held observed that ". . . at the time the appeal is taken from sentence, a copy of the voir dire should be ordered so that the Appellant [sic] Court will see whether or not that is the case" (App. 32). A transcript of the voir dire was not submitted by petitioner to the Appellate Division as part of the record on appeal.

felt that the court's sentence promise was excessive ". . . especially so because his co-defendant in indictment 431 of 1975 was sentenced to two years to four years." (App. 32). However, petitioner added that ". . . three and a half to . . . seven years would be acceptable to him and he is considering to withdraw [*sic*] his plea if your Honor follows through with the promise of six years to twelve." (App. 32).

The court briefly adverted to petitioner's psychiatric history and concluded the review of the probation report by noting petitioner's stated belief that he was a victim of the criminal justice system as well as *the* victim of the crimes he had committed (App. 32-33). Petitioner was then sentenced as promised to a term of imprisonment of six to twelve years.

On the 10th of October, 1978, certiorari was granted by this Court, and the question presented for review is whether petitioner's counseled plea of guilty was obtained in violation of due process.

Summary of Argument

Though a pervasive practice for many years (*see* D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial (1966); and, Comment, *People* v. *Selikoff, The Route to Rational Plea Bargaining* 21 Cath. Lawyer 144, 145 n.4 (1975)), plea bargaining only recently received its imprimatur from this Court (*see, Blackledge* v. *Allison,* 431 U.S. 63 (1977)). The present controversy concerns the proper role to be played by the trial court in this process. It is respondent's submission that the trial court may directly participate in plea negotiations without violating due process.

The participation of the judge in plea negotiations, whether or not he later presides at trial, is consistent with due process when conducted in open court in the presence of the prosecutor, and defense counsel and his client, and when the proceedings are transcribed for appellate review (*see, generally, Blackledge* v. *Allison,* 431 U.S. 63, 76-77 (1977)). The court's participation serves the salutary purpose of insulating the accused from the possible overreaching of the prosecutor, whose adversarial role may discourage the formulation of an agreement which serves the interests of both the defendant and the State (*see,* Lambros, *Plea Bargaining and the Sentencing Process,* 53 F.R.D. 509, 515, 517 (1971)).

The record and defense counsel protect the accused from an overbearing judge. Any improprieties in the proceedings will be readily discernible in the record (*see, e.g., United States* v. *Wiley,* 267 F.2d 453 (7th Cir. 1959); *People* v. *Williams,* 46 App. Div. 2d 783, 360 N.Y.S.2d 453 (2nd Dept. 1974); and, *People* v. *Dennis,* 28 Ill. App. 3d 74; 328 N.E.2d 135 (1975)). Defense counsel will not only protect and amplify the record (*see, United States ex rel. McGrath* v. *LaVallee,* 348 F.2d 373, 376 (2nd Cir. 1963), *cert. denied* 383 U.S. 952 (1967)), but will dissipate the allegedly coercive atmosphere created by the presence of the judge (*see, generally, Miranda* v. *Arizona,* 384 U.S. 436, 461, 466 (1966); and *Brady* v. *United States,* 397 U.S. 742, 753-754 (1970)).

In our view, the atmosphere created by the participation of the judge, when properly regulated, will be conducive to candor and fairness. "It is the errant judge, not judicial participation in general that is coercive." (Comment, *New Federal Rule of Criminal Procedure* 11(e): *Dangers In Restricting the Judicial Role In Sentencing Agreements,* 14 The Am. Crim. L. Rev. 305, 311 n.32 (1976)).

The participation of the trial judge, moreover, does not compromise his ability to preside impartially at trial. Judges are frequently exposed to information which is at least as prejudicial as a defendant's participation in plea negotiations or his offer to plead guilty. A court may suppress evidence which conclusively establishes the movant's guilt or may have presided at the defendant's first trial which was reversed on appeal. Due process does not prohibit the court from presiding at trial in either example, nor does due process require a finding that the defendant's plea of guilty was involuntary because he believed that the court could no longer be imparital (*see, e.g., Withrow* v. *Larkin,* 421 U.S. 35, 49, 56 (1975); and, *Ungar* v. *Sarafite,* 376 U.S. 575, 584-588 (1964)).

A distinction has been drawn by this Court between conduct which is "patently unconstitutional" and conduct which "encourages" a plea of guilty (*see, Corbitt* v. *New Jersey,* U.S. (Decided December 11, 1978; No. 77-5903) slip opinion at 5-6). In our view, Mr. Justice Held's sentence statement falls within the latter category. Without commenting on the strength of the evidence or offering advice, Mr. Justice Held offered petitioner, through counsel, lenient treatment consistent with the policies underlying the encouragement of pleas (*see, Id.,* at 10-11). *If* convicted after trial, the defendant would be accorded every consideration consistent with the lawful exercise of the court's sentencing prerogatives. The court never committed itself to a maximum sentence in the event of conviction after trial; a commitment was made concerning the sentence to be imposed upon a plea of guilty (*compare, e.g., Murray* v. *United States,* 419 F.2d 1076 (10th Cir. 1969); *Euziere* v. *United States,* 249 F.2d 293 (10th Cir. 1957); and *United States* v. *Tateo,* 214 F. Supp. 560 (S.D.N.Y. 1963)).

Mr. Justice Held simply did not " 'deliberately employ (his) charging and sentencing powers to induce (the petitioner) to tender a plea of guilty', . . . with the 'objective (of) penaliz(ing) (his) reliance on his legal right . . .' " (*Corbitt* v. *New Jersey* (Decided December 11, 1978; No. 77-5903) dissenting opinion at 5 n.7).

Objectively viewing all the circumstances relevant to the taking of the plea (*see, e.g,. Brady* v. *United States,* 397 U.S. 742, 749 (1970); and, *Toler* v. *Wyrick,* 563 F.2d 372, 373 (8th Cir. 1977), *cert. denied,* 98 S. Ct. 1455), we think that the record establishes that petitioner, who was at all times represented by able counsel and was himself experienced in the criminal law and procedure, was motivated to plead guilty by his evaluation of the strength of the People's case relative to his defense, if any, and his desire to avail himself of a more lenient sentence. When viewed in the proper context, the court's statement concerning the range of sentencing alternatives, conveyed to petitioner by counsel, could not have had the effect he now ascribes to them. What emerges from the record is a shrewd and experienced plea bargainer rather than an intimidated and coerced victim of an overbearing judge. Accordingly, his conviction should be affirmed.

ARGUMENT

Petitioner's counseled plea of guilty was voluntarily entered. The active participation of the trial judge in the plea bargaining process does not require that petitioner's plea be set aside. The record amply supports the conclusion that the plea was a voluntary and intelligent choice among the alternative courses of action open to petitioner. Therefore the order of the Appellate Division should be affirmed.

Petitioner urges this Court to set aside his counseled plea of guilty on the ground that it was coerced by the active

participation of the trial judge in the plea negotiations. To support his application for relief, petitioner contends that the active participation in the negotiations by the judge assigned to try the case renders *every* plea involuntary. Alternatively, petitioner applies the "patently unconstitutional conduct" and "totality of the circumstances" tests to establish the due process violation essential to the setting aside of his plea. We submit, that, notwithstanding the trial judge's active participation in the plea negotiations, petitioner's plea of guilty was voluntary. Consequently, the order of the Appellate Division should be affirmed.

A. The Active Participation of the Trial Judge in the Plea Bargaining Process.

Petitioner's first challenge to the constitutionality of his plea focuses on the trial judge's active participation in the plea bargaining process which, he contends, taints every plea. However, he accepts, as constitutionally permissible, the active participation of a judge other than the judge to whom the case has been assigned for trial, since both the possibility and fear of judicial impartiality at trial would be eliminated. Apparently, a statutory scheme permitting a trial judge to either ratify or reject a plea agreement between the prosecutor and the defendant (*see, e.g.,* Fed. R. Crim. T. 11(e)(1)), would also be acceptable to petitioner since it is the active participation of the judge presiding at trial which is central to petitioner's challenge.

Concern over the proper role to be played by the court in the plea bargaining process has generated a considerable amount of commentary. The general consensus of opinion appears to favor the prohibition of direct judicial partici-

pation.[14] In addition, judicial participation is prohibited by statute in the federal district courts, as well as in the courts of nine states and the District of Columbia.[15] Criticism or outright prohibition of this practice may also be found in the case law—both federal and state.[16]

[14] *See, e.g.,* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY, § 3.3(a) (App. Draft 1968); ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 779, 51 A.B.A.J. 444 (1965); ALI, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.3(1) (1975); NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURT'S REPORT, § 3.7 (1973); NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAW, UNIFORM RULES OF CRIMINAL PROCEDURE, Rule 441(a) (1974); Gallagher, *Judicial Participation in Plea Bargaining: A Search For New Standards,* 9 HARV. C.R. & C.L.L. REV. 29 (1974); Note, Judicial Participation in Guilty Pleas—A Search For Standards, 33 U. PITT. L. REV. 151 (1971); White, *A Proposal For Reform of the Plea Bargaining Process,* 119 U. PA. L. REV. 439, 452-453 (1971); Note, *Judicial Plea Bargaining,* STAN. L. REV. 1082 (1967); Note, *Official Inducements to Plead Guilty: Suggested Morals For a Market Place,* 32 U. CHI. L. REV. 167, 180-181 (1964).

[15] Fed. R. Crim. P. 11(e)(1); Arizona (Ariz. R. Crim. P. 17.14(a) (1973)); Arkansas (Ark. R. Crim. P. 25.3 (1977); Colorado (Colo. Rev. Stat. Ann. § 16-7-302 (1974), Colo. R. Crim. P. 11(f)(1)); District of Columbia (D.C.C.E.S.C.R. Crim. R. 11(e)(1) (West Supp. 1977-78)); New Jersey (New Jersey Court Rules 3:9-3(a) (West 1978)); New Mexico (N.M. Stat. Annot. § 41-23-21(g)(1) (1974); North Dakota (N. Dak. R. Crim. P. 11(d)(1)); Oregon (Ore. Rev. Stat. § 13.432(1) (1974); Pennsylvania (Pa. R. Crim. P. 319(b)(1) (Purdon's 1978); and, South Dakota (S. Dak. Cod. Laws Annot. 23A-7-8, Rule 11(e)(1) (eff. July 1, 1979)).

[16] *See, e.g., United States* v. *Werker,* 535 F.2d 198 (2nd Cir. 1976), *cert. denied,* 429 U.S. 926 (1976); *Griffith* v. *Wyrick,* 527 F.2d 109, 111 n.2 (8th Cir. 1975); *United States* v. *Gallington,* 488 F.2d 637, 640 (8th Cir. 1973), *cert. denied,* 416 U.S. 907 (1974); *Scott* v. *United States,* 419 F.2d 264 (D.C. Cir. 1969); *Brown* v. *Beto,* 377 F.2d 950, 956, 957 (5th Cir. 1967); *United States* v. *Cariola,* 323 F.2d 180, 187 (3rd Cir. 1963); *Gordon* v. *State,* 577 P.2d 70 (Sup. Ct. Alaska 1978); *People* v. *Clark,* 183 Colo. 201, 515 P.2d 1242 (1973); *State* v. *Gummieny,* 568 P.2d 1194 (S. Ct. Hawaii, 1977); *Anderson* v. *State,* 263 Ind. 583, 335 N.E.2d 225 (1975); *State* v. *Byrd,* 203 Kan. 45, 453 P.2d 22 (1969); *People* v. *Bennett,* 269 N.W.2d 618 (Ct. App. Mich. 1978), and *People* v. *Earegood,* 12 Mich. App. 256 162 N.W.2d 802 (Ct. App. Mich. 1968), *rev'd* 383 Mich. 82, 173 N.W.2d 205 (1970); *Rogers* v. *State,* 243 Miss. 219, 136 So.2d 331 (1962); *Mesmer* v. *Rains,* 351 P.2d 1018 (Okla. Cr. 1960); *Commonwealth* v. *Evans,* 434 Pa. 52, 252 A.2d 689 (1969); and *Ex parte Shuflin,* 528 S.W.2d 610 (Tex. Crim. App. 1975).

There is, however, a discernible trend emerging from the commentaries which favors an expanded judicial role, if not the complete control of the plea bargaining process by the courts.[17] Moreover, statutes governing the plea procedures in four states permit active judicial participation.[18] Some states, *e.g.,* New York (N.Y. Crim. Pro. L. Art. 220 (McKinney's Supp. 1977-78)), Maine (R. Crim. P.11 (West 1978)), and Louisiana (West's La. C. Crim. P. Art. 552, *et. seq.* (Supp. 1978)), have elaborate rules governing plea procedures, none of which expressly proscribe judicial participation.[19]

[17] *See, e.g.,* Approved Draft of the Standing Committee on American Bar Association Standards for Criminal Justice, § 14-3.3(c),(e), permitting the court to act as a "moderator" at the plea conference held at the request of both sides and to advise the parties as to what disposition would be acceptable to the court, or to inquire of the parties where they have neither advised the judge of a plea agreement nor requested to meet for plea discussion purposes, whether disposition without trial has been explored and to allow an adjournment to enable plea discussions to occur; Alschuler, *The Trial Judge's Role In Plea Bargaining, Part I,* 76 COLUM. L. REV. 1059 (1976); Comment, New Federal Rule 11(e): *Dangers In Restricting The Judicial Role In Sentencing Agreements,* 14 THE AM. CRIM. L. REV. 305 (1976); Note, *Restructuring the Plea Bargain,* 82 YALE L.J. 286 (1972); Lambros, *Plea Bargaining and the Sentencing Process,* 53 F.R.D. 509 (1971).

[18] Florida (Fla. R. Crim. P. 3.170-3.171 (Lawyers Coop. 1973) (committee notes)); Illinois (Ill. Annot. Stat. Ch. 110A, § 402 (Smith-Hurd, 1976)) North Carolina (N.C. Gen. Stat. § 15A-1021(a)); and, Vermont (Vt. R. Crim. P. 11(e)(1)). The courts in Rhode Island (*State* v. *Welch,* 112 R.I. 321, 309 A.2d 128, 133-134 (1973)) and Florida (*State* v. *Davis,* 308 So.2d 27, 29 (Sup. Ct. Fla. 1975)) apparently encourage judicial participation.

[19] In Kings County, New York, a special Conference Part has been established for pre-trial plea discussions to be conducted by a judge who does not preside at trials. (*See* N.Y. Ct. R. § 751.3(1) (McK. Consol. Laws of N.Y. 1977), and Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I,* 76 COLUM. L. REV. 1059, 1090 n. 98 (1976)). Under this system, an accused has two chances to obtain a "favorable" disposition.

While the Kings County experiment may be unusual, the commentators agree that judicial plea bargaining is pervasive (*See, e.g.,* Lambros, *Plea Bargaining and the Sentencing Process,* 53 F.R.D. 509, 514-515 (1971); Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I,* 76 COLUM. L. REV. 1059, 1061-1062, 1149-1150, 1151-1152 (1976)).

This Court, however, at least tacitly approved some degree of judicial participation in *Brady* v. *United States,* 397 U.S. 742, 755 (1970), *citing, Shelton* v. *United States,* 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd* 356 U.S. 26 (1958), and has expressly approved the offer of substantial benefits to *encourage* pleas (*Corbitt* v. *New Jersey,* — U.S. — (Decided December 11, 1978; No. 77-5903) slip opinion at p. 6). We submit that the direct participation of *any* judge in the plea negotiations, whether or not he will preside at trial, does not, standing alone, violate due process.

First, the argument that judicial plea bargaining is more coercive than prosecutorial plea bargaining, because of the court's sentencing power, is sound only as a matter of legal theory. The practice in this country compels a different conclusion. As noted in one commentary:

> Although the prosecutor may not possess the power and prestige of the judge, from the vantage point of the defendant his influence may be more threatening. The prosecutor . . . has various means not available to the judge to exert pressure upon the defendant: *i.e.,* the power to press charges against the accused's family or friends, the power . . . to decide which counts to prosecute, and the power to recommend sentences (which, in those jurisdictions where the judge normally follows the the prosecutor's recommendations is equivalent to the power to fix sentences). Since the 'disparity of position,' in terms of coercive impact on the defendant, may in many instances be greater between the prosecutor and the accused, the validity of an absolute distinction between judge and prosecutor inducements on grounds of coercive effect and voluntariness is open to doubt. (Chalker, *Judicial Myopia, Differential Sentencing and the Guilty Plea—A Constitutional Examination,* 6 Am. Crim. L. Rev. 187, 192 (1968), cited in Alschuler, *The Trial Judge's Role In Plea Bargaining, Part I,* 76 Colum. L. Rev. 1059, 1107 n. 165 (1976). *See,* Note, *Judicial Plea Bargaining,* 19 Stan. L. Rev. 1082, 1085-1086, 1088-1089 (1967); and, Note, *Restructuring the Plea Bargain,* 82 Yale L.J. 286, 305 (1972).[20]

In a similar vein, it is well-known that an accused who pleads guilty will receive a lighter sentence than if he is convicted after a trial (*see, e.g., Brady* v. *United States,* 397 U.S. 742, 751 (1970); *Dewey* v. *United States,* 268 F.2d 124, 128 (8th Cir. 1959); and, *People* v. *Melton,* 35 N.Y.2d 327, 330, 320 N.E.2d 622, 361 N.Y.S.2d 877 (1974)). Moreover, a particular judge's sentencing policies soon become well-known to the defense bar as well as to defendants, either through their own experiences or through conversations with their lawyers or other defendants (*see e.g., People* v. *Earegood,* 12 Mich. App. 256, 162 N.W.2d 802, 809 (Ct. App. Mich. 1968), *rev'd on other grounds,* 383 Mich. 82, 173 N.W.2d 205 (1970); and *State* v. *Buckalew,* 561 P.2d 289, 294 (Sup. Ct. Alaska, 1977) (O'Connor, J., dissenting)).

It is difficult to perceive how plea negotiations are less coercive where the prosecutor, rather than trial judge,

---

[20] For a discussion of the deference paid by the courts to prosecutorial sentence recommendation and its consequences in a system of non-participation, *see* Alschuler, *The Trial Judge's Role In Plea Bargaining, Part I,* 76 Colum. L. Rev. 1059, 1061-1076, 1107-1108 (1976). In essence, the sentencing function is turned over to the prosecutor.

An example of the kind of pressure which may be lawfully exerted by the prosecutor is found in *Bordenkircher* v. *Hayes,* 434 U.S. 357 (1978), where the prosecutor threatened to reindict the defendant under the Habitual Criminal Act, carrying a mandatory sentence of life imprisonment, if he did not plead guilty to the existing indictment in return for a sentence recommendation of five years.

Indeed, it has been stated that the greatest source of pressure to plead guilty is the prosecutor, particularly where the evidence of defendant's guilt is weak (*see, e.g., Note, Restructuring the Plea Bargain,* 82 Yale L.J. 286, 292-293, 303, 305 (1972)).

calls the court's well-known sentencing policies to the defendant's attention and then "offers" him a shorter sentence by either a sentence recommendation, which is routinely accepted, or a charge reduction.[21]

Indeed,

> the question immediately arises whether it makes any sense to single out for condemnation only the case where the judge himself brings this policy to the defendant's attention. Because it is no surprise to the accused, but confirmation of what he almost certainly has been told, it is doubtful whether any additional pressure is being exerted on the defendant. . . . (Note, *Judicial Plea Bargaining,* 19 STAN. L. REV. 1082, 1085 (1967)).

A second argument is that judicial participation in plea negotiations should be prohibited because of the likelihood that a trial judge could not conduct a fair trial after negotiations had terminated. Petitioner adds that, consistent with due process, a judge could participate in the plea negotiations if another judge presides at the trial. Due process imposes no such restrictions (*see, e.g., United States* v. *Gallington,* 488 F.2d 637 (8th Cir. 1973), *cert. denied,* 416 U.S. 907 (1974), and, *United States* v. *Walker,* 473 F.2d 136 (D.C. Cir. 1972)).

Aside from judicial awareness that, "pleas of guilty are often offered for reasons other than actual guilt . . ." (*United States* v. *Walker,* 473 F.2d 136, 138 (D.C. Cir. 1972). *See Brown* v. *Peyton,* 435 F.2d 1352, 1356 (4th Cir. 1970), *cert. denied,* 406 U.S. 931 (1972); and Alschuler, *The*

[21] *See, Shupe* v. *Sigler,* 230 F. Supp. 601, 606 (D. Neb. 1964): "Whether the court or prosecutor makes the threats or promises seems immaterial."

Trial Judge's Role In Plea Bargaining, Part I, 76 COLUM. L. REV. 1059, 1109 (1976), trial judges are frequently exposed to information which is at least as prejudicial as a defendant's participation in plea negotiations or his offer to plead guilty. For example, a court may suppress evidence which conclusively establishes the movant's guilt or may have presided at the defendant's first trial which was reversed on appeal. Yet no one would seriously contend that, in either case, due process would prohibit the court from presiding at trial or that the defendant's plea of guilty was involuntary because he believed that the court could no longer be impartial (*see, e.g., Withrow* v. *Larkin,* 421 U.S. 35, 49, 56 (1975); *Ungar* v. *Sarafite,* 376 U.S. 575, 584-588 (1964)).

Petitioner's suggestion about a division of responsibility between a plea-bargaining judge and a trial judge provides little assurance that the trial judge will not later learn that the defendant participated in plea negotiations and that, for one reason or another, the negotiations were terminated. In addition, the administrative burdens and costs imposed on an already strained court system, particularly in the small and single-judge jurisdictions, would be substantial. The problem would of course be magnified where the defendant uses this "reassignment" or "substitute-judge" plan to "shop around" for a sympathetic judge (*see,* Alschuler, *The Trial Judge's Role In Plea Bargaining, Part I,* 76 COLUM. L. REV. 1059, 1111-1114 (1976)).

A third argument frequently cited in support of prohibiting judicial participation in the plea bargaining process is that it ". . . makes it difficult for the judge objectively to determine the voluntariness of the plea when it is offered . . ." (ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY, § 3.3(a), *Commentary,* at p. 73 (App. Draft, 1968)). This criticism, how-

ever is applicable to the plea bargaining system as a whole since there is no reason to conclude that a judge who refrains from participating in plea bargaining will conduct the kind of "penetrating and comprehensive examination" (*United States ex rel. Elksnis* v. *Gilligan,* 256 F. Supp. 244, 255 (S.D.N.Y. 1966) (quoting *Von Moltke* v. *Gillies,* 332 U.S. 708, 724 (1948) (plurality opinion)), envisioned by the prohibition advocates, at least so long as he is confronted with substantial case-load pressures (Alschuler, *The Trial Judge's Role In Plea Bargaining, Part I,* 76 COLUM. L. REV. 1059, 1114 (1976).[22] As noted by one commentator,

> . . . the effectiveness of [the] examination, as currently conducted, has been exaggerated (footnote omitted). Neither prosecution nor defense now disclose candidly the ful details of their plea.
>
> * * *
>
> At this late stage in the bargaining process, the interests of the prosecutor and defendant are no longer adverse. Instead they have a joint commitment to the success of the plea bargain they have shaped. The parties therefore seek to present to the judge a facade of scrupulous regularity. (Note, *Restructuring the Plea Bargain,* 82 YALE L.J. 286, 306-307, 307 n.68 (1972). *See,* Note, *Judicial Plea Bargaining,* 19 STAN. L. REV. 1082, 1088 (1967); Comment, *New Federal Rule of Criminal Procedure* 11(e): *Dangers In Restricting The Judicial Role In Sentencing Agreements,* 14 THE AM. CRIM. L. REV. 305, 314, 314 nn. 45-46 (1976)).[23]

[22] In *People* v. *Ganci,* 27 N.Y.2d 418, 267 N.E. 2d 263, 318 N.Y.S. 2d 484 (1971), *cert. denied,* 402 U.S. 924 (1971), the Court of Appeals noted the substantial congestion of the criminal trial calendar in holding that the sixteen month delay between the defendant's arraignment on the indictment and trial did not deprive him of his constitutional and statutory right to a prompt trial.

Obviously, the "substitute judge" proposed by petitioner would be in no better position to assess the voluntariness of the plea than the plea-bargaining trial judge or judge whose role is confined to ratification or the rejection of the proffered plea (*see,* Alschuler, *The Trial Judge's Role In Plea Bargaining, Part I,* 76 COLUM. L. REV. 1059, 1115 (1976)).

The point is that the participation of the judge in plea discussions, whether he is the trial judge or plea bargaining judge, is consistent with due process when conducted in open court in the presence of both the defense and prosecution, and when the proceedings are fully transcribed for later appellate review (*see, generally, Blackledge* v. *Allison,* 431 U.S. 63, 76-77 (1977)). Any improprieties would be readily discernible in a record protected and amplied by defense counsel (*see, e.g., United States* v. *Wiley,* 267 F.2d 453 (7th Cir. 1959); *People* v. *Williams,* 46 App. Div. 2nd 783, 360 N.Y.S. 2d 453 (2d Dept. 1974); and *People* v. *Dennis,* 28 Ill. App. 3rd 74, 328 N.E.2d 135 (1975)). Moreover, negotiations can take place in an atmosphere of candor and fairness presided over by the one person who is responsible for creating that atmosphere. The agreement reached will be more reflective of the needs of the defendant and the State than an agreement reached between the parties most interested in the outcome, especially since the judge will have the information he needs to make an informed decision (*see,* Lambros, *Plea Bargaining and the Sentencing Process,* 53 F.R.D. 509, 515, 517 (1971). *Compare Bordenkircher* v. *Hayes,* 434 U.S. 357 (1978)). "It is the errant judge, not judicial participation in general that is coercive." (Note,

[23] For an example of the deceit resorted to by a plea-bargaining defendant, *see, United States* v. *Stassi,* 583 F.2d 122 (3rd Cir. 1978).

New Federal Rule of Criminal Procedure 11(e): *Dangers In Restricting The Judicial Role In Sentencing Agreements,* 14 THE AM. CRIM. L. REV. 305, 311 n.32 (1976), citing Lambros, *supra,* 53 F.R.D. at 516-518. See, *State* v. *Buckalew,* 561 P.2d 289, 293-294 (Sup. Ct. Alaska, 1977) (O'Connor, J., dissenting); and, *Commonwealth* v. *Evans,* 434 Pa. 52, 252 A.2d 689, 692 (1969) (Bell. Ch. J., dissenting).

In short, judges ". . . are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." (*United States* v. *Morgan,* 313 U.S. 409, 421 (1941)). Consistent with the notion that ". . . it is the defendant's perception of the judge that will determine whether the defendant will feel coerced to enter a plea . . ." (*United States* v. *Werker,* 535 F.2d 198, 202 (2nd Cir. 1976), *cert. denied,* 429 U.S. 926 (1976)), a defendant should be required to demonstrate that he *reasonably* believed that he could not get a fair trial before setting aside his counseled plea (*Cf. United States* v. *Nazzaro,* 472 F.2d 302, 303 (2nd Cir. 1973)). That burden, we submit, is not satisfied merely by claiming that the trial judge participated in the plea negotiations (*see, Ungar* v. *Sarafite,* 376 U.S. 575 (1964)). Moreover, there is no reason to believe that the coercive atmosphere allegedly created by the participation of the trial court cannot be dissipated by the presence of counsel (*see, generally, Miranda* v. *Arizona,* 384 U.S. 436, 461, 466 (1966); and *Brady* v. *United States,* 397 U.S. 742, 753-754 (1970)).

To support his contention that due process forbids the participation of the trial judge in plea negotiations, petitioner relies on *United States* v. *Jackson,* 390 U.S. 570 (1968). In *Jackson,* this court held unconstitutional the death penalty provision of the federal anti-kidnapping law

which permitted the imposition of the death sentence only upon a jury's recommendation. The problem in *Jackson* was to determine "whether the Constitution permits the establishment of a such a death penalty, applicable only to those who assert the right to contest their guilt before a jury." (*Id.* at 581). For a due process violation to be found under *Jackson,* three factors must be present: A penalty which attaches to the assertion of a right; the chilling effect on the assertion of that right as an incident of the penalty; and, an alternative means of achieving a legitimate goal which renders the penalty needless. (*see Brady* v. *United States,* 397 U.S. 742, 746 (1970)). It is clear, however, that *Jackson* did not hold that every burden on the exercise of a constitutional right is invalid (*Corbitt* v. *New Jersey,* —U.S.— (Decided December 11, 1978; No. 77-5963), slip opinion at 5-6).[24]

No one can contend that plea bargaining is prohibited by the Constitution or that it is not an effective method of achieving legitimate goals (*see, Blackledge* v. *Allison,* 431 U.S. 63, 71 (1977)). And, as outlined above, the participation of the judge in plea negotiations, whether or not that judge will later preside at trial, is not inherently coercive. The court's participation serves the salutary purpose of insulating the accused from a possibly overbearing prosecutor whose adversarial role in the plea negotiations may discourage the formulation of an agreement which serves the interests of both the defendant and the State. Moreover, a record of the proceedings and defense counsel protect the defendant from an overbearing judge.

---

[24] Petitioner, we think, has misconstrued *Jackson.* The "evil" which this Court found in the federal statute was ". . . not that it necessarily *coerces* guilty pleas and jury waivers but that it needlessly *encourages* them." (390 U.S. at 583). Thus, the language which petitioner liberally extracts from Jackson is inappropriate to establish that a practice is inherently coercive.

In the case at bar, petitioner has failed to identify the penalty which is imposed upon a defendant who asserts his Fifth Amendment right not to plead guilty and his Sixth Amendment right to demand a trial when the same judge participates in the plea negotiations and presides at trial. A "penalty" is imposed within the meaning of due process when a defendant is sentenced more harshly after his first conviction is reversed and the second sentence is not based on any information developed since the first trial (*North Carolina* v. *Pearce,* 395 U.S. 711 (1969)). In *Pearce,* data was collected showing that increased sentences on reconviction were "far from rare . . ." (395 U.S. 711, 725 n.20), thereby leading this Court to believe that the hazard of being penalized inhered in the resentencing process (*compare, e.g., Chaffin* v. *Stynchcombe,* 412 U.S. 17 (1973); and, *Colten* v. *Kentucky,* 407 U.S. 104 (1972)). Similarly, due process is violated when a defendant is subjected to punishment which is applicable only to those who assert their right to a jury trial (*See, United States* v. *Jackson,* 390 U.S. 570 (1968); and, *Corbitt* v. *New Jersey,* — U.S. — (Decided December 11, 1978; No. 77-5903)). And lastly, due process was violated in *Blackledge* v. *Perry,* 417 U.S. 21 (1974), because the prosecutor reindicted a convicted misdemeanant on a felony charge after the defendant had invoked an appellate remedy. Each of these cases involved ". . . the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right . . ." (*Bordenkircher* v. *Hayes,* 434 U.S. 357, 362 (1978)).

Plea bargaining presents a different case. The Constitution does not forbid the State from offering substantial benefits to defendants to encourage them to plead guilty (*Corbitt* v. *New Jersey,* — U.S. — (Decided, December 11, 1978; No. 77-5903) slip opinion at p. 6). By the same token, there are legitimate reasons for imposing a more substantial sentence when a defendant is convicted after a trial, *e.g.,* trial observation of the defendant as well as exposure to the evidence against him (*see, North Carolina* v. *Pearce,* 395 U.S. 711, 723 (1969)). Thus, in the absence of vindictiveness, a higher sentence may constitutionally be imposed, despite whatever incidental deterrent effect the higher sentence might have on the assertion of Fifth and Sixth Amendment rights (*see Chaffin* v. *Stynchcombe,* 412 U.S. 17, 29, 32 n.20 (1973); and *Bordenkircher* v. *Hayes,* 434 U.S. 357, 364 (1978)).[25]

Similarly, the hazard that the participating judge will deprive the defendant of a fair trial does not inhere in this plea bargaining system to any greater extent than where a judge, presiding at a pre-trial hearing, suppresses evidence which conclusively establishes guilt and then presides at trial.

Due process *is* violated ". . . where the . . . judge 'deliberately employ[s] (his) . . . sentencing power[ ] to induce a defendant to tender a plea of guilty,' . . . and where [he does] so with the 'objective [of] penaliz[ing] a person's reliance on his legal right . . .' " (*Corbitt* v. *New Jersey,* — U.S. — (Decided, December 11, 1978; No. 77-5903), dissenting opinion at p. 5. *See, Parker* v. *North Carolina,* 397 U.S. 790, 802 (1970) (Opinion of BRENNAN, J., in which DOUGLAS, J., and MARSHALL, J., joined). *Cf. Webb* v. *Texas,* 409 U.S. 95 (1972). Certain statements made by

---

[25] A trial judge who has participated in plea negotiations simply does not have the same motivation to penalize a defendant for asserting his constitutional rights as does a judge who has been reversed on appeal (*see, generally Chaffin* v. *Stynchcombe,* 412 U.S. 17, 27 (1973); and *North Carolina* v. *Pearce,* 395 U.S. 711 (1969)). There is nothing in the record or petitioner's brief to show that the hazard of being penalized for asserting Fifth and Sixth Amendment rights inheres in a system of plea bargaining which permits judicial participation (*compare, North Carolina* v. *Pearce,* 395 U.S. 711, 725 n.20 (1969)).

the court are by their nature inherently coercive, *e.g.*, "if you plead guilty, you will receive the minimum sentence; if you go to trial you will be entitled to no consideration from the court" (*see, e.g., United States* v. *Herron,* 551 F.2d 1073, 1077 (6th Cir. 1977); *Tyler* v. *Swenson,* 427 F.2d 412 (8th Cir. 1970); *Euziere* v. *United States,* 249 F.2d 293 (10th Cir. 1957); and, *United States* v. *Tateo,* 214 F. Supp. 560 (S.D.N.Y. 1963). Similarly, where the court sentences a defendant to a harsher term *because* the defendant refused to plead guilty, he has been penalized (*see, e.g., Wiley* v. *United States,* 267 F.2d 453 (7th Cir. 1959)).

Due process may also be violated when the defendant pleads guilty because he *reasonably* believes that when the same judge participates in the plea negotiations and presides at trial, he will not get a fair trial. A reasonable belief is not based on the court's participation alone; it may be based upon the court's conduct, including his statements, during or after the negotiations (*see, Schaffner* v. *Greco,* — F. Supp. — (S.D.N.Y. 1978) (77 Civ. 281; Decided 10/20/78), slip opinion at 6-10).

Due process is violated in these cases because the defendant is not free, in a constitutional sense, to accept or reject the court's proposal; his rights not to plead guilty and demand a trial become illusory (*see, Bordenkircher* v. *Hayes,* 434 U.S. 357, 363 (1978)). Due process is also violated when defendant has been ". . . punish[ed] . . . because he has done what the law plainly allows him to do . . ." (*Id.,* at 363).

The mere participation of the trial judge in plea negotiations is not inherently coercive. Thus, in the absence of "patently unconstitutional conduct" petitioner's counseled plea of guilty, like every other plea, must be measured against the "totality of the circumstances", in which all of the relevant circumstances surrounding the plea are considered (*Brady* v. *United States,* 397 U.S. 742, 749 (1970).

In North Carolina v. *Alford,* 400 U.S. 25, 31 (1970), this Court said:

> *Jackson* established no new test for determining the validity of guilty pleas. The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. (Citations omitted). That he would not have pleaded guilty except for the opportunity to limit the possible death penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice, especially where the defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage.

The *participation* of the trial judge in plea negotiations is only one factor to be considered in determining whether the plea was voluntary (*Toler* v. *Wyrick,* 563 F.2d 372 (8th Cir. 1977), *cert. denied,* 98 Ct. 1455; *United States ex rel. Robinson* v. *Housewright,* 525 F.2d 988 (7th Cir. 1975); *Brown* v. *Peyton,* 435 F.2d 1352 (4th Cir. 1970), *cert. denied,* 406 U.S. 931 (1972); *United States ex rel. McGrath* v. *LaVallee,* 348 F.2d 373 (2nd Cir. 1965), *cert. denied,* 383 U.S. 952 (1966); *Toler* v. *State,* 542 S.W.2d 80 (Ct. App. Mo. 1976); *Anderson* v. *State,* 263 Ind. 583, 335 N.E.2d 225 (1975); *People* v. *Montgomery,* 27 N.Y.2d 601, 261 N.E.2d 409, 313 N.Y.S.2d 411 (1970); and, *People* v. *Darrah,* 33 Ill. 2d 175, 210 N.E.2d 478 (1965), *cert. denied,* 383 U.S. 919 (1966), *reh. denied,* 383 U.S. 963 (1966).[26]

---

[26] Several state and federal courts which have criticized judicial participation in the plea bargaining process have relied to a significant degree on the reasoning found in the ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 3.3(a). (*See, e.g., Brown* v. *Beto,* 377 F.2d 950 (5th Cir. 1967); *Scott* v. *United States,* 419 F.2d 264 (D.C. Cir. 1969); *State* v. *Buckalew,* 561 P.2d 289 (Sup. Ct. Alaska 1977); *State* v. *Wolfe,* 46 Wis. 2d 478, 175 N.W.2d 216 (1970); and *Commonwealth* v. *Evans,* 434 Pa. 52, 252A.2d 689 (1969). In light of the proposed changes in the Standards relating to the proper judicial role in plea bargaining, the continued vitality of these decisions is open to some doubt (*see,* Approved Draft of the Standing Committee on American Bar Association Standards for Criminal Justice, § 14-3.3 (c), (e) *See, ante,* p. 19 n. 17 for discussion of the changes.

In conclusion, the participation of the trial judge in plea negotiations is compatible with due process when both the prosecution and the defense attend the negotiations, and when the proceedings are transcribed for appellate review. Under this system, the rights of the State and the defendant should be fully protected. Since the "bifurcated system" advocated by petitioner is not constitutionally mandated, New York should be permitted to develop its own rules governing plea procedure consistent with due process (*see, Haley* v. *Ohio*, 332 U.S. 596, 604 (1948) (FRANKFURTER, J., concurring)).

In the absence of "patently unconstitutional" conduct, petitioner's plea should be measured by the traditional test of voluntariness in which the participation of the trial judge is but one of several factors to be considered.

B. The Court's Conduct Does Not Require the Vacatur of Petitioner's Plea.

We agree with petitioner that,

> . . . it has long been held that *certain promises or threats of harsh treatment by the trial court* or prosecutor unfairly burden or intrude upon the defendant's decision-making process. Even though the defendant is not necessarily rendered incapable of rational choice, his guilty plea may be invalid (footnote omitted). *Parker* v. *North Carolina*, 397 U.S. 790, 802 (Opinion of BRENNAN, J., in which DOUGLAS, J., and MARSHALL, J., joined) (emphasis added)).

However, ". . . there is no *per se* rule against encouraging guilty pleas." (*Corbitt* v. *New Jersey*, — U.S. — (Decided December 11, 1978; No. 77-5903) slip opinion at p. 6). A distinction, therefore, has been drawn between conduct which is "patently unconstitutional" and conduct which merely encourages guilty pleas. We submit that Mr. Justice Held's conduct falls within the latter category.

After petitioner was positively and convincingly identified at the pre-trial (*Wade*) identification hearing,[27] petitioner was informed through counsel that if he pleaded guilty to robbery in the first degree, the court would sentence him to a term of imprisonment of six to twelve years. At the same time, Mr. Justice Held informed defense counsel that, if petitioner were convicted after trial, the court would impose a sentence of twelve and one-half years to twenty-five years, "(s)ubject of course of me (*sic*) reading the probation report (since) (i)t is a practice in my court when there is an armed robbery, to give . . . a maximum sentence, unless there are mitigating circumstances." (App. 28). Defense counsel and petitioner discussed the offer, which was ultimately accepted (App. 28).[28]

---

[27] *United States* v. *Wade*, 388 U.S. 218 (1967); N.Y. Crim. Pro. Law § 710.20(5).

[28] Petitioner and respondent disagree concerning the chronology of events preceding the plea. According to petitioner's reading of the record, the court's statement concerning the imposition of the maximum sentence was conveyed to him *after* he initially rejected the court's six to twelve year offer. He also suggests that the qualifying language, *viz.*: "subject . . . of me reading the probation report . . .", was an afterthought mentioned for the first time at the sentencing. (*Petitioner's Brief* at pp. 25, 26-27).

We submit that the more logical interpretation of the record is that the court's statement concerning the sentence alternatives was made at the same time. In this regard, the interpretation of the record is crucial since if petitioner's interpretation of the sequence of events is the correct one, he may well be entitled to the relief he seeks.

With regard to his suggestion that the qualifying language was mentioned at the sentencing for the first time as an afterthought, the following should be noted. First, when Mr. Justice Held corrected defense counsel's recollection of the events surrounding the plea by adding the qualifying language, counsel made no objections. Thus, his ratification of the court's recollection is clear from the record. Second, there is no record of defense counsel's conversation with petitioner after the bench conference at which the plea was discussed. If petitioner was not informed of this qualifying language, his grievance is with his lawyer, not the judge. However, no claims concerning counsel's adequacy have been made.

A third interpretation, which combines both petitioner's and respondent's, is that the court advised counsel that he would accept a plea to robbery in the first degree and sentence petitioner to a six to twelve year term of imprisonment. Counsel then relayed that information to petitioner, who rejected the proposal. Counsel returned to the bench at which time he was advised of the court's sentencing policies. These facts do not establish patently unconstitutional conduct either.

In our view, a plea should be set aside when ". . . it is clear that the statements [by the judge] were calculated to influence the defendant[] to the point of coercion into entering the plea[] of guilty." (*Euziere* v. *United States,* 249 F.2d 293, 295 (10th Cir. 1957)). Under this standard, where a judge tells the defendant that, if he is convicted after trial, he will be entitled to no consideration, and then threatens him with the imposition of a maximum (possibly illegal) sentence, the defendant's plea may be invalid. The situation is quite different, where, *as here,* the judge, without commenting on the strength of the case or offering advice, informs the defendant through counsel that, in the absence of mitigating circumstances, his practice is to impose the maximum sentence permitted by law and then says that he will depart from that practice and sentence the defendant to a lesser, specific sentence if he pleads guilty.

In the first example, the court's statement may only be viewed as a threat to penalize the assertion of Constitutional rights. To require a defendant to choose between the imposition of the maximum penalty (possibly life imprisonment) if he is convicted after trial and the prospect of a substantially reduced term if he pleads guilty, ". . . amounts to a coercion as a matter of law." (*United States* v. *Tateo,* 214 F. Supp. 560, 567 (S.D.N.Y. 1966) (Weinfeld, D.J.)). In the second case, the defendant is offered lenient treatment consistent with the policies underlying plea bargaining. *If* convicted after trial, the defendant will be accorded every consideration consistent with the lawful exercise of the court's sentencing prerogatives. The court's statement therefore merely "encourages" the defendant to plead guilty. (*See, ante,* at pp. 29-30).

To support his contention that Mr. Justice Held's statement concerning the sentence alternatives could only be construed as a threat to penalize the assertion of constitutional rights, petitioner relies on the "disparity" between the sentence alternatives and a remark made by the court at the conclusion of the sentencing. We think that this reliance is misplaced.

The record discloses that when petitioner first appeared before Mr. Justice Held, the original plea offer, *viz:* a conditional sentence promise of three and one-half years to seven years and a plea to robbery in the second degree, was resurrected (App. 27). Petitioner rejected the proposal and insisted that he was innocent (App. 27).

The next day, the *Wade* hearing was conducted at which the People's only witness described the robbery and identified petitioner as the perpetrator. The court, now acquainted with the facts and circumstances of the crime, legitimately offered a plea to robbery in the first degree and conditionally promised a sentence of six to twelve years. (*See, North Carolina* v. *Pearce,* 395 U.S. 711, 723 (1969)).[29] Without making any commitments, the court also disclosed its sentencing practices in armed robbery cases, which could be reduced if mitigating factors appeared in the probation report (App. 28). Thus, petitioner was advised that, *at most,* the sentence upon conviction after trial would be twice that imposed upon a plea of guilty. Petitioner was therefore told that the sentence differential could be less (*see, Murray* v. *United States,* 419 F.2d 1076 (10th Cir. 1969)).

In *Corbitt* v. *New Jersey,* — U.S. — (Decided December 11, 1978; No. 77-5903), slip opinion at 11, this Court,

> . . . unequivocally recognize[d] the constitutional propriety of extending leniency in exchange for a plea of guilty and not extending leniency to those who

[29] The prosecutor had apparently revised the plea offer after the *Wade* hearing was completed [App. 28].

> have not demonstrated those attributes on which leniency is based.

We are unable to perceive the constitutional infirmity in the flexible sentencing differential proposed by Mr. Justice Held in the case at bar (*compare, e.g., People* v. *Clark,* 183 Colo. 201, 515 P.2d 1242 (1973); *Letters* v. *Commonwealth,* 346 Mass. 403, 193 N.E.2d 578 (1963); and, *State* v. *Benfield,* 264 N.C. 75, 140 S.E.2d 706 (1965)).

With regard to the court's remark at the conclusion of the sentence proceeding, petitioner has isolated two sentences and placed an interpretation on them which finds no support in the record. After reviewing an unsavory probation report, which referred to an "interesting" view of the criminal justice system and petitioner's relationship to it, Mr. Justice Held mused:

> The defendant shows no remorse whatsoever. I almost wish that I had not promised six to twelve, but nonetheless, I feel that six to twelve is enough time for this man to receive.
>
> Unfortunately, it appears quite obvious that at least at this juncture unfortunately that he is not going to be reformed. He is only going to become punished (App. 33).

It is obvious from the entire statement that Mr. Justice Held was expressing regret about the sentence he promised to petitioner in light of the information provided to him

after the conditional promise was made (see, e.g., *United States ex rel. McGrath* v. *LaVallee,* 348 F.2d 373, 375 (2nd Cir. 1966), *cert. denied,* 383 U.S. 952 (1966); and, Note, *Restructuring the Plea Bargain,* 82 YALE L.J. 286, 291 (1972)). Mr. Justice Held was also expressing the concern expressed by many judges today that this defendant, because he showed "no remorse whatsoever", was not going to profit from his experience in prison and possibly become a useful member of society when released. To that extent, six to twelve years "is enough time for this man to receive (since) (h)e is only going to become punished." (App. 33) (emphasis added).

To adopt petitioner's casuistry in the case at bar would cripple any viable system which encourages guilty pleas by offering substantial benefits. A sentence differential is critical to the plea bargaining process; without it a defendant would have little reason to plead guilty. So long as the defendant is free in a constitutional sense to accept or reject the court's offer, due process is not violated. (*See, Bordenkircher* v. *Hayes,* 434 U.S. 357, 363 (1978)).

A fair reading of the record supports the conclusion that the court's sentencing statement was merely an encouragement to plead guilty. A substantial benefit was offered to petitioner which petitioner was free to accept or reject. There was nothing in the statement which would support the belief that if petitioner rejected the offer, the court would punish him for exercising his constitutional rights. The terms of the offer were not so disparate that to require a choice amounted to coercion as a matter of law. Accordingly, Mr. Justice Held's conduct in the case at bar does not require the vacatur of petitioner's plea.

C. Petitioner's Plea of Guilty Was Voluntary.

The voluntariness of petitioner's plea can only be determined by considering all of the relevant circumstances surrounding it (*Brady* v. *United States,* 397 U.S. 742, 749 (1970)), of which the participation of the court is but one (*see,* cases collected at ante, p. 31). The circumstances are to be judged by objective standards (*Toler* v. *Wyrick,* 563 F.2d 372, 373 (8th Cir. 1977), *cert. denied,* 98 S. Ct. 1455; *United States* v. *Cruso,* 536 F.2d 21, 24 (3rd Cir. 1976); *United States ex rel. Robinson* v. *Housewright,* 525 F.2d 988, 991-992 (7th Cir. 1975); *Mosher* v. *LaVallee,* 491 F.2d 1346, 1348 (2nd Cir. 1973), *cert. denied,* 416 U.S. 906 (1974); and *United States ex rel. Curtis* v. *Zelker,* 466 F.2d 1092, 1098 (2nd Cir. 1972), *cert. denied,* 410 U.S. 945 (1973). The question to be resolved is not so much whether the judge participated in the plea discussions, but what was said and its probable effect (*United States ex rel. McGrath* v. *LaVallee,* 319 F.2d 308, 315 (2nd Cir. 1963) (Friendly, C.J., concurring and dissenting); and, *People* v. *Darrah,* 33 Ill. 2d 175, 210 N.E.2d 478 (1965), *cert. denied,* 383 U.S. 919 (1966), *reh. denied,* 383 U.S. 963 (1966). *See, Harrison* v. *United States,* 392 U.S. 219, 223 (1968)). We submit that, "[a]lthough mindful that courts must indulge in every reasonable presumption against the loss of constitutional rights . . ." (*Illinois* v. *Allen,* 397 U.S. 337, 343 (1970), the record amply supports the conclusion that petitioner's plea was not coerced by Mr. Justice Held's statement concerning the sentence.

At the taking of the plea, petitioner, who was represented by counsel, signaled his understanding of the legal consequences of his decision to plead guilty. Petitioner unhesitatingly acknowledged that his plea was voluntary and it was offered because he was guilty. A factual basis for the plea was developed by the court, and petitioner

stated that he was relying on no promises other than Mr. Justice Held's promise concerning the sentence.

In *Blackledge* v. *Allison,* 431 U.S. 63, 74 (1977), this Court observed that ". . . the representations of the defendant . . . at the (taking of the plea) constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity." Petitioner's unhesitating admissions are therefore strong evidence of the plea's voluntariness, especially in the absence of any allegations that he was directed to affirmatively answer Mr. Justice Held's questions (see, *Blackledge* v. *Allison, supra,* 431 U.S. at 77-78; and *United States ex rel. McGrath* v. *LaVallee,* 319 F.2d 308, 321 (2nd Cir. 1963) (MARSHALL, then Circuit Judge, dissenting)). Moreover, "[t]he person closest to (petitioner) during the proceedings, his trial counsel . . .". (*Petitioner's Brief* at p. 30), assumed that "[w]hen (his client) pleaded guilty . . . he *was* guilty." (App. 28). (Emphasis added).

It should also be noted that in September, 1975, Petitioner pleaded guilty to the same consolidated indictment and three months later withdrew that plea. Thus, within one year, petitioner twice admitted his guilt, affirmatively providing a factual basis for the plea and satisfactorily answering the inquiries of two Justices of the Supreme Court. Within that same time period, he also insisted that he was "railroaded" (App. 103) and "coerced" (App. 12-17; 21-33). The absence of any of the indicia of innocence or coercion at the taking of the plea, we submit, militates against his after-the-fact assertions to the contrary (*see, United States* v. *Brady,* 397 U.S. 742, 758, (1970)).

Second, petitioner's plea came after he was identified at the *Wade* hearing as the perpetrator of the robbery and after the court advised defense counsel at a bench confer-

ence of the range of sentencing alternatives resulting from a conviction after trial and a plea of guilty.[30] The testimony at the *Wade* hearing was particularly significant because it not only marked the first time that petitioner was corporeally identified, but it also marked his first exposure to the witness' devastating testimony.[31] Thus, contrary, to petitioner's assertions, *two* events intervened between petitioner's demand of a trial and his second plea of guilty two days later (*compare, United States ex rel. McGrath* v. *LaVallee,* 319 F.2d 308, 319 (2nd Cir. 1963) (MARSHALL, then Circuit Judge, dissenting)).

In *Brady* v. *United States,* 397 U.S. 742, 756 (1970), this Court recognized that,

> (o)ften the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and the apparent likelihood of securing leniency should a guilty plea be offered and accepted.

Petitioner may well have preferred to plead guilty recognizing that his chances for acquittal were slight, and thereby avail himself of a more lenient sentence. Such considerations do not militate against a finding that the plea was voluntary (*Id.,* at 750-751).

It is also significant that the intervening events came before trial when petitioner was still able to consider the alternatives with relative objectivity (*compare, e.g., Schaffner* v. *Greco,* — F. Supp. — (S.D.N.Y. 1978) (77 Civ. 281, Decided 10/20/78) (Lasker, D.J.) and, *United States* v. *Tateo,* 214 F. Supp. 560 (S.D.N.Y. 1963)). The court neither commented about the strength of the prosecution's case nor advised petitioner to take a plea (*compare, e.g., United States* v. *Anderson,* 468 F.2d 440 (5th Cir. 1972); *United States* v. *Schmidt,* 376 F.2d 751 (4th Cir. 1967), *cert. denied,* 389 U.S. 884 (1967); *United States ex rel. McGrath* v. *LaVallee,* 319 F.2d 308 (2nd Cir. 1963); *Beaver* v. *State,* 247 S.E.2d 448 (Sup. Ct. S. Car. 1978); *Byrd* v. *United States,* 377A.2d 400 (D.C. App. 1977); and, *State* v. *Benfield,* 264 N.C. 75, 140 S.E.2d 706 (1965)). And, petitioner points to no conduct in the record to support his belief that the court would not treat him fairly at trial (*compare, e.g., Euziere* v. *United States,* 249 F.2d 293 (10th Cir. 1957); *Schaffner* v. *Greco,* — F. Supp. — (S.D.N.Y.) (77 Civ. 281; Decided 10/28/78) (Lasker, D.J.), slip opinion at 8-10; *Letters* v. *Commonwealth,* 346 Mass. 403, 193 N.E.2d 578, 580 (1963); and, *Rogers* v. *State,* 243 Miss. 219, 136 So.2d 331 (1962)).[32]

A third factor to be considered is the ". . . background, experience, and conduct of the accused." (*Johnson* v. *Zerbst,* 304 U.S. 458, 464, (1938)). At twenty-four years of age, petitioner, who was represented by counsel and had pleaded guilty once to the same consolidated indictment, already had an extensive criminal record, including adjudi-

---

[30] We again note our differences with petitioner concerning the chronology of events preceding the plea. (See *ante,* p. 33, n.28.)

[31] Mrs. Walker testified that she had seen petitioner's face throughout the incident, which lasted five to ten minutes. The witness also testified that she had seen petitioner in the neighborhood on two occasions a few weeks before the robbery and insisted that "[t]wenty years from now I will still remember his face." [App. 64].

[32] Petitioner claimed that Mr. Justice Held was "prejudiced" because of his ruling on the motion to suppress identification testimony. The record reveals that the court never decided the motion. Both petitioner at the taking of the plea [App. 7], and defense counsel at the sentencing [App. 32], conceded as much.

Petitioner also complained about the court's prejudicial remarks made in the presence of the jury. A transcript of the jury selection was not submitted to the Appellate Division nor has it been made a part of this record. Respondent should not be required to respond to such assertions (*see, Machibroda* v. *United States,* 368 U.S. 487 [1962]).

cations as a juvenile delinquent and as a Youthful Offender, and a robbery conviction as an adult offender. In fact, he was on parole when he committed the crimes which were the subject matter of his plea. Petitioner certainly was not inexperienced in the intricacies of the criminal law and procedure when he pleaded guilty for the second time (*see, Uveges* v. *Commonwealth of Pennsylvania,* 335 U.S. 437, 442 (1948)).

As a predicate felon, petitioner was aware that if convicted after a trial he would receive a maximum term of imprisonment of nine and one-half years to twenty-five years, and a minimum term of imprisonment of one-half the maximum term (*see,* N.Y. Penal Law § 70.06(3)(a), (4) (McKinney 1975)). Moreover, petitioner was accused in two separate indictments of the crime of robbery in the first degree. If convicted under both indictments a maximum sentence of twelve and one-half years to thirty years could be imposed (*see,* N.Y. Penal Law § 70.30(1) (b), (c) (McKinney 1975)).

Under these circumstances, Mr. Justice Held's statement concerning the range of sentencing alternatives, as well as their conditional nature, could hardly have come as a surprise to petitioner. Considering his criminal background and the seriousness of the charges petitioner was merely informed of the reality of his situation—a reality which could not have been unknown to him.

The information contained in petitioner's psychiatric reports is also revealing. Those reports describe him as a manipulator (App. 80) and a malingerer (App. 92). One psychiatrist commented that he "... appears to be a rather 'street wise' individual (who in all likelihood) with all his years in prison ... has acquired the correct answers to give the psychiatrists." (App. 80, 81). The reports also reveal

a persistent pattern of anti-social behavior suggesting a contempt for the law and authority (App. 80-81; 86 and 87; 102 and 104). The portrait painted is not one of an easily cowed individual. Indeed, his abusive and contemptuous behavior at the sentencing, which resulted in a thirty day contempt citation, only serves to corroborate the conclusions in aforementioned reports.

Fourth, the pattern of petitioner's conduct during the twenty-one months between his arrest and sentencing suggests an effort on his part to thwart the prosecution of his two indictments. In addition to the several psychiatric examinations, petitioner was assigned four different attorneys, pleaded guilty twice and was permitted to withdraw that plea after he was again examined by psychiatrists to determine his fitness to proceed and by the Probation Department in aid of sentencing.[33]

Most revealing of this pattern is petitioner's statement to the Probation Department that one reason for his decision to withdraw his second plea was his belief that his sentence was excessive " . . . especially so because his co-defendant in indictment 431 of 1975 was sentenced to two to four years." (App. 32). Petitioner also stated that "... three and a half to seven years (the original sentence promised *twice* rejected) would be acceptable to him and he is considering to withdraw his plea if Your Honor follows through with the promise of six to twelve." (App. 32).

The inescapable conclusion to be drawn from the "totality of the circumstances" is that petitioner, who was at all times represented by able counsel and was himself experi-

---

[33] Parenthetically, we note that petitioner was found unfit to proceed because "... he *verbalized* suicidal ideas ..." [App. 92] and because of his "... failure to participate in the psychiatric evaluation ..." [App. 85]. However, after finding him fit to proceed at a later time, the examining psychiatrist observed that "... the manner in which he spoke, as well as words, suggest artifice or affection of illness." [App. 94].

enced in the criminal law and procedure, was motivated to plead guilty by his evaluation of the strength of the People's case relative to his defense, if any, and his desire to limit his penal liability. When viewed in this context, the court's comments pertaining to the sentencing alternatives, *conveyed to petitioner by counsel,* could not have had the effect he belatedly ascribed to them. What emerges from this record is a shrewd and experienced plea bargainer rather than an intimated and coerced victim of an overbearing judge. Petitioner should not be permitted to withdraw his counseled plea of guilty simply because he is dissatisfied with his sentence (*see, Mathis* v. *State of North Carolina,* 266 F. Supp. 841, 845 (D.N.C. 1967)). Accordingly, the judgment of conviction should be affirmed.

CONCLUSION

The Court's participation in the plea bargaining process is not prohibited by the Constitution. Petitioner's counseled plea was voluntarily entered. The order of the Appellate Division should in all respects be affirmed.

Dated: Brooklyn, New York
December, 1978

Respectfully submitted,

EUGENE GOLD
District Attorney, Kings County
400 Municipal Building
Brooklyn, New York 11201

RICHARD E. MISCHEL[34]
Assistant District Attorney
of Counsel

---

[34] The writer is indebted to Assistant District Attorney Laurie Stein Hershey who prepared the brief submitted to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.